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Davis v. United States: Good Faith, Retroactivity, and the Loss of Principle

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Notes

DAVIS v. UNITED STATES: GOOD FAITH, RETROACTIVITY, AND THE LOSS OF PRINCIPLE

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In *Davis v. United States*,[1] the Supreme Court of the United States held that evidence seized by the police in violation of the Fourth Amendment was admissible because the police performed their search in good-faith reliance on binding appellate precedent.[2] In so holding, the Court abandoned the principle of treating similarly situated defendants the same and drew into question the integrity of judicial review.[3] This decision marks another step in the turn away from the principled justifications for the exclusionary rule toward a deterrence-only rationale that acknowledges a right with no remedy.[4] As a result, the evolution of Fourth Amendment jurisprudence will cease as defendants have little to no incentive to challenge existing precedent, while law enforcement will be further emboldened to challenge the edges of what is constitutionally acceptable.[5] Alternatively, the Court should have taken the unremarkable step of simply applying its own precedent appropriately, rather than crafting a new good-faith exception at odds with the principles of our criminal justice system.[6]

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1. 131 S. Ct. 2419 (2011).
2. *See infra* Part III.
3. *See infra* Part IV.A.1.
4. *See infra* Part IV.A.2.
5. *See infra* Part IV.B.
6. *See infra* Part IV.C.

I. THE CASE

On April 27, 2007, Willie Gene Davis was the passenger in a car that police pulled over for violation of a noise ordinance.[7] Davis initially told police that his name was Ernest Harris.[8] When police discovered that Davis was lying about his name, they arrested him for providing false information.[9] Police had asked Davis to step out of the car and keep his jacket on, but instead Davis removed his jacket and left it on the front passenger seat of the car.[10] Police then escorted him to their squad car.[11] They returned to and searched the passenger compartment where Davis had been sitting and discovered a revolver in the pocket of Davis's jacket.[12]

On October 27, 2007, Davis was indicted as a felon in possession of a revolver in violation of 18 U.S.C. § 922(g)(1).[13] Davis moved to suppress the gun, arguing that it was obtained by an illegal search of the automobile, in violation of his Fourth Amendment rights.[14] The United States District Court for the Middle District of Alabama denied Davis's motion because the Court of Appeals for the Eleventh Circuit grants officers the ability to conduct a contemporaneous warrantless search of the passenger compartment and containers incident to an arrest.[15] Davis preserved for appeal his objection to the decision, arguing that the outcome of *Arizona v. Gant*,[16] soon to be decided by the United States Supreme Court, could affect whether Davis's gun could be admitted into evidence.[17] A jury convicted Davis, and he was sentenced to 220 months in prison.[18]

Following the Supreme Court's decision in *Gant*, the Court of Appeals for the Eleventh Circuit held that the police search did vi-

7. United States v. Davis, No. 2:07-cr-0248-WKW, 2008 WL 1927377, at *2 (M.D. Ala. Apr. 28, 2008), *aff'd*, 598 F.3d 1259 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419 (2011).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Davis argued that warrantless searches are per se unreasonable under the Fourth Amendment unless they fall within a set of well-defined exceptions, and that the facts of this case do not fall within any such exception. *Id.* at *2–3.

15. *Id.* at *3 (citing United States v. Gonzalez, 71 F.3d 819, 825 (11th Cir. 1996), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009)).

16. 162 P.3d 640 (Ariz. 2007), *aff'd*, 556 U.S. 332 (2009).

17. *Davis*, 2008 WL 1927377, at *1–2.

18. United States v. Davis, 598 F.3d 1259, 1262 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419 (2011).

olate Davis's Fourth Amendment rights, but further concluded that the evidence would not be suppressed because the search was done in good-faith reliance on appellate precedent.[19] The court first reasoned that—under *Gant*'s new formulation—police could only conduct their search if Davis was "within reaching distance of the passenger compartment at the time of the search."[20] Since Davis was sitting in the squad car at the time of the search, the court reasoned that, if *Gant* applied retroactively to Davis's case, then police violated Davis's Fourth Amendment rights.[21] Because Supreme Court decisions are applied retroactively to all cases on appeal at the time of the decision, the court applied *Gant* to Davis's case and held that the police violated Davis's Fourth Amendment rights.[22]

The Court of Appeals would not conclude, however, that exclusion of evidence naturally follows from a Fourth Amendment violation.[23] Reasoning that exclusion of evidence is not an individual right, but exists only to deter police misconduct, the Court of Appeals concluded that exclusion should not apply to deter objectively reasonable police activity.[24] Given that police were acting in accordance with *United States v. Gonzalez*,[25] the court applied a good-faith exception to their actions and refused to apply the exclusionary rule to Davis's case as doing so would serve no deterrent purpose.[26]

The United States Supreme Court granted certiorari to consider whether the exclusionary rule should apply when police conduct a search in compliance with binding precedent that is later overruled.[27]

II. LEGAL BACKGROUND

The Fourth Amendment protects individuals "against unreasonable searches and seizures."[28] The scope of that right and how best to

19. *Id.* at 1263, 1267–68.

20. *Id.* at 1262 (quoting *Gant*, 556 U.S. at 343) (internal quotation marks omitted).

21. *Id.* at 1263.

22. *Id.*

23. *Id.*

24. *Id.* at 1265–66.

25. 71 F.3d 819 (11th Cir. 1996), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009). *Gonzalez* held that police officers could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment. *Id.* at 825.

26. *Davis*, 598 F.3d at 1268.

27. Davis v. United States, 131 S. Ct. 502 (2010).

28. U.S. CONST. amend. IV.

secure it has been the subject of numerous Supreme Court cases[29] and extensive literature.[30]

This Part will deal first with the change in law that prompted Davis's appeal: how the Fourth Amendment applies to the search of an automobile as an incident to arrest.[31] Second, this Part will outline the history of the exclusionary rule, from its principled origins to its recent shift to a deterrence-only rationale.[32] Third, this Part will address how the principled and deterrence-only rationales have affected the applicability of the exclusionary rule in the context of good-faith exceptions and the retroactive application of exclusion.[33]

A. That Is Not What We Meant: The Supreme Court Limits Allowable Automobile Searches After a Straightforward Rule Proves to Be Not So Straightforward

The Court has held that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment [but for] a few specifically established and well-delineated exceptions."[34] One such exception is a search of the person performed incident to arrest.[35] The Court has

29. A search of the Supreme Court database maintained by Washington University in St. Louis showed that the Court has heard 305 cases related to search and seizure/Fourth Amendment issues from 1946–2010. Analysis of Supreme Court Decisions, THE SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php (follow "Criminal Procedure" hyperlink; then highlight "search and seizure (other than as pertains to vehicles or Crime Control Act)" and "search and seizure, vehicles"; then follow "Analyze" hyperlink).

30. A Westlaw search of "Fourth Amendment" in law reviews and journals generated 281 results for a one-year period, from April 12, 2011, to April 12, 2012.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. *See infra* Part II.C.

34. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted).

35. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that, because a custodial arrest based on probable cause is reasonable under the Fourth Amendment, a search of the person incident to that arrest is also reasonable). The search incident to arrest has a back-and-forth history in the Supreme Court, with cases seemingly contradicting each other from one to the next. The idea of a search incident to arrest made its first appearance in dictum in *Weeks v. United States*, when the Court stated that the right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime" was "always recognized under English and American law." 232 U.S. 383, 392 (1914). The Court expanded the right from persons to places, though again in dictum, in *Agnello v. United States*. 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made . . . is not to be doubted."). This idea moved from dictum to holding in *Marron v. United States*. 275 U.S. 192, 199 (1927) (holding that federal agents had a right to search an arrestee's premises contemporaneously to the arrest "in order to find and seize things used to carry on the criminal enterprise").

also allowed a search incident to arrest to include the area within the arrestee's immediate control.[36] The Court included an arrestee's immediate control (1) to protect officer safety, because the arrestee might have a weapon to resist arrest or escape, and (2) to prevent the destruction of evidence.[37]

In the context of automobile searches, the Court focused on officer safety, but also wanted to provide a straightforward rule for police to apply and grant an automatic right to search automobiles. Relying on the twin rationales of officer safety and protection of evidence, the Court held in *New York v. Belton* that the search incident to arrest exception included the interior of automobiles.[38] The Court reasoned that the relatively small size of the passenger compartment is invariably within the immediate control of an arrestee, and therefore an arrestee might easily reach for a weapon or destroy evidence.[39]

The *Belton* Court also focused on the need for a straightforward rule to apply to the search of an automobile incident to arrest.[40] Instead of trying to determine the area of immediate control for automobiles on a case-by-case basis, the Court reasoned that a bright-line rule would provide certainty to individuals as to the scope of their constitutional rights and to police officers as to the scope of their authority to search.[41] Therefore, the Court held that searches of an automobile incident to a lawful arrest were reasonable under the Fourth Amendment.[42]

Following *Belton*, the circuit courts remained divided over the scope of allowable searches of automobiles incident to arrest, particularly when the arrestee was already out of the vehicle when the search was performed. Some courts focused more on the concern for officer safety and preventing the destruction of evidence.[43] When courts applied this logic, they held that searches were unreasonable when the

36. Chimel v. California, 395 U.S. 752, 763 (1969).

37. *Id.* at 763–64 & n.9.

38. 453 U.S. 454, 460 (1981). This automobile exception to the warrant requirement for searches is distinct from the *Carroll* doctrine, which allows officers to search an automobile without a warrant whenever they have probable cause to believe evidence of a crime is inside the automobile. Carroll v. United States, 267 U.S. 132, 149 (1925). This includes any containers inside the car. California v. Acevedo, 500 U.S. 565, 579 (1991).

39. *Belton*, 453 U.S. at 460.

40. *Id.* at 459–60.

41. *Id.*

42. *Id.* at 460.

43. *See, e.g.*, United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003) ("The principle behind *Belton* and *Chimel* is to protect police officers and citizens . . . from the actions of an arrestee who might gain access to a weapon or destructible evidence.").

arrestee was not in the vicinity of the automobile.[44] Conversely, some federal circuit courts focused more on the *Belton* Court's desire to create a straightforward rule.[45] In these situations, courts upheld searches of automobiles as incident to arrest, even when the arrestee was not within reaching distance of the vehicle.[46] As the law developed, some members of the Supreme Court noted the circuit split and expressed concern that police had assumed too much authority as a result of the *Belton* ruling.[47]

Given the circuit split over *Belton*'s scope and some concern that police were overreaching in their practice, the Court returned to the issue of automobile searches incident to arrest in *Arizona v. Gant*.[48] There the Court said that treating *Belton* as presumptively allowing searches of cars incident to arrest created a "police entitlement rather than . . . an exception" to the Fourth Amendment's warrant requirement.[49] The Court reasoned that giving *Belton* such a broad reading "untether[ed] the rule from [its original] justifications" of officer safety and the need to prevent destruction of evidence.[50] The Court therefore held that the search of a vehicle incident to arrest is valid only when the occupant is unsecured and within reaching distance of

44. *E.g.*, *id.* at 379 (finding that the search of an arrestee's vehicle was unjustified given that the arrestee was lying face down, handcuffed, surrounded by four police officers, six to ten feet away from the automobile); United States v. Edwards, 632 F.3d 633, 643–44 (10th Cir. 2001) (rejecting "any justification" for police search of an automobile where the arrestee was in the squad car 100–150 feet away from his vehicle, as there was no danger the arrestee could reach a weapon or destroy evidence); United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987) (finding a search of an arrestee's vehicle unjustified when arrestee was handcuffed in the back of the police car).

45. *See, e.g.*, United States v. Hrasky, 453 F.3d 1099, 1102–03 (8th Cir. 2006) (upholding a search as valid under *Belton*, even though the arrestee had been arrested and sitting in a police car for sixty minutes because police need a clear, readily understandable rule).

46. *See id.* at 1103 (upholding a search where arrestee was secured in police car); *see also* United States v. White, 871 F.2d 41, 44 (6th Cir. 1989) (finding that, under *Belton*, a search incident to arrest is valid whether or not the arrestee is within reach of the car and its contents at the time of the search), *overrulled by* United States v. Buford, 632 F.3d 264 (6th Cir. 2011).

47. *See* Thornton v. United States, 541 U.S. 615, 628–29 (2004) (Scalia, J., concurring in the judgment) (questioning the reasoning of *Belton* that the passenger compartment is inevitably within the arrestee's immediate control and recognizing that police have treated the right to search a car—regardless of the facts—as presumptively reasonable); *see also id.* at 624 (O'Connor, J., concurring in part) (expressing concern that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception").

48. 556 U.S. 332 (2009).

49. *Id.* at 342 (quoting *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part)).

50. *Id.* at 343.

the passenger compartment at the time of the search.[51] Writing in dissent, Justice Alito suggested that while the Court did not explicitly state as much, its decision overturned *Belton*, which in practice would cause the suppression of evidence gathered in searches carried out in good-faith reliance on settled case law.[52]

B. From Principle to Empirical: The Court's Remedy for Fourth Amendment Violations

When police seize evidence illegally, the remedy for that Fourth Amendment violation is the exclusion of that evidence.[53] This section explores the history of the exclusionary rule and its justification by the Court. The Court first defended the exclusion of evidence as a necessary component of the Fourth Amendment that was vital to maintaining the rule of law. More recently, the Court has said that exclusion is a judicially created remedy that can only be justified when it "pays its way" by objectively measuring its deterrent value against the cost of letting criminals go free.

The first time the Court excluded evidence solely because police violated the Fourth Amendment was in *Weeks v. United States*.[54] In *Weeks*, the Court refused to admit into evidence letters and papers seized from Weeks's home in violation of the Fourth Amendment.[55] The Court rested its reasoning on the idea that the government should not benefit from acting illegally.[56] Moreover, the Court was concerned that allowing illegally seized evidence might also taint the

51. *Id.* Additionally, the Court granted that searches would be valid if in pursuit of evidence related to the crime that caused the arrest. *Id.* It should be noted that the Court has also created exceptions to search automobiles where there is reasonable suspicion to believe that the suspect is dangerous, Michigan v. Long, 463 U.S. 1032, 1051 (1983), and where police have probable cause to believe the vehicle contains evidence of a crime, United States v. Ross, 456 U.S. 798, 825 (1982).

52. *Gant*, 556 U.S. at 355–56 (Alito, J., dissenting).

53. Congress has also made it possible for a victim of a Fourth Amendment violation to sue the individual officer or his or her department under 42 U.S.C. § 1983 (2006). That remedy falls outside the scope of this Note.

54. 232 U.S. 383 (1914). Excluding evidence as a remedy was first used in *Boyd v. United States*, 116 U.S. 616 (1886). There, however, exclusion was justified because police had violated the defendant's Fourth and Fifth Amendment rights. *Id.* at 633, 638 (finding that compelling a man to produce his personal papers so that they could be used against him at trial violated the right against self-incrimination under the Fifth Amendment and constituted an unreasonable search under the Fourth Amendment).

55. *Weeks*, 232 U.S. at 398.

56. *See id.* at 394 (suggesting that admitting tainted evidence into trial would "affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution").

integrity of the court system.[57] Ultimately, the Court concluded that without the exclusion of evidence, the Fourth Amendment would have no value and "might as well be stricken from the Constitution."[58] This idea that the exclusion of evidence is a necessary component of Fourth Amendment protection continued throughout most of the first half of the twentieth century.[59]

The Court's shift away from this original principle began when the question of whether the Fourth Amendment should be incorporated onto the states was presented in *Wolf v. Colorado*.[60] In *Wolf*, the Court acknowledged that the right of privacy protected by the Fourth Amendment was necessary in a free society and therefore should apply to the states through the Fourteenth Amendment.[61] But the Court refused to agree that exclusion of evidence was a necessary, constitutional requirement to guarantee Fourth Amendment protection.[62] It instead suggested that exclusion was a judicially created remedy, and that crafting appropriate remedies for Fourth Amendment violations would be better left to the states.[63]

When the Supreme Court ultimately found that the exclusionary rule applied to the states, it returned to the idea of judicial integrity, but also reasoned that exclusion would serve to deter police misconduct. In *Mapp v. Ohio*,[64] despite Mapp's protests and without a search warrant, state officers forced entry into her house to look for a suspect they wanted to question in connection with a bombing.[65] Once inside, officers discovered obscene materials and arrested Mapp for their possession.[66] The Court found that the police violated Mapp's

57. *See id.* at 392 (stating that the government's efforts to obtain a conviction through means that destroy constitutional rights "should find no sanction in the judgment of the courts").

58. *Id.* at 393.

59. *See, e.g.*, McDonald v. United States, 335 U.S. 451, 453 (1948) (stating that the Fourth Amendment protects "the innocent and guilty alike," and that the law provides exclusion of evidence to secure constitutional protection); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (finding that "the [g]overnment's own wrong cannot be used," or else the Fourth Amendment would be reduced "to a form of words").

60. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

61. *Id.* at 28.

62. *Id.*

63. *Id.* at 28, 32.

64. 367 U.S. 643 (1961).

65. *Id.* at 644. The police came to Mapp's house twice that day. *Id.* After Mapp first denied police entry, they returned a second time, handing her a piece of paper they claimed was a search warrant, which Mapp stuffed into her bosom. *Id.* Officers struggled with Mapp to get the paper back, ultimately "[r]unning roughshod over . . . [her]." *Id.* at 644–45.

66. *Id.* at 645.

Fourth Amendment rights, and held that the evidence obtained as a result of the unlawful search was "inadmissible in a state court."[67] In so holding, the Court stressed the importance of judicial integrity and the principle that the exclusionary rule has its origins in the Constitution.[68] It also concluded that states had failed to provide appropriate remedies for Fourth Amendment violations without the exclusionary rule.[69] The Court further reasoned that the government and its court system would lose legitimacy if they did not follow their own laws.[70] Finally, the Court suggested that the exclusionary rule is necessary as a deterrent to bad police action.[71]

After *Mapp*, the Court gradually abandoned judicial integrity as a justification for the exclusionary rule and instead focused on deterrence as the sole justification for the exclusion of evidence.[72] Indeed, in *United States v. Calandra*,[73] the Court completely reframed the purpose and meaning of the exclusionary rule. In *Calandra*, the Court refused to suppress evidence obtained in violation of the Fourth Amendment from grand jury proceedings.[74] The Court's decision relied entirely on the deterrence rationale of the exclusionary rule.[75] The Court reasoned that exclusion is not implicit in the Fourth Amendment but is instead a judicially created remedy.[76] It stated further that exclusion was not an individual right guaranteed by the Constitution,[77] and therefore concluded that the Constitution does

67. *Id.* at 655.

68. *Id.* at 659, 649.

69. *Id.* at 651–52.

70. *Id.* at 659.

71. *See id.* at 656 ("[T]he purpose of the exclusionary rule is to deter [unlawful conduct] . . . by removing the incentive to disregard [the Fourth Amendment]." (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)) (internal quotation marks omitted)); *see also id.* at 670 (Douglas, J., concurring) (discussing the failure of other remedies at the state level to prevent law enforcement from engaging in the "'shabby business' of unlawful entry into a home").

72. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting) (stating that the exclusionary rule "rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence"). Chief Justice Burger reframed the discussion of the exclusionary rule by questioning its continued validity in the absence of evidence of deterrence. *See id.* at 416.

73. 414 U.S. 338 (1974).

74. *Id.* at 351–52.

75. *See id.* at 347 ("[T]he rule's prime purpose is to deter future unlawful police conduct . . . .").

76. *Id.* at 348.

77. *Id.* at 347 ("The purpose of the exclusionary rule is not to redress the injury to the . . . victim.").

not prevent the use of illegally seized evidence in all proceedings.[78] Instead, as with any other judicially created remedy, exclusion would only be proper where its deterrent purpose is most effectively served.[79] Reasoning that police are motivated by convictions in criminal proceedings, the Court found that excluding evidence from grand jury proceedings would not deter police misconduct, and therefore the exclusionary rule should not apply.[80]

After *Calandra*, deterrence continued to be the touchstone for the applicability of the exclusionary rule,[81] subject to an objective study of the costs and benefits of exclusion.[82] Furthermore, the Court shifted its analytical focus from the rights of the individual defendant to the social costs of excluding evidence.[83] The Court's cost-benefit measure of exclusion ultimately justified the creation of exceptions to the exclusionary rule and called into question the rule's retroactive application.

C. Deterrence v. Principle: The Exclusionary Rule Applied (and Limited)

By turning away from the principled justification towards a deterrence-only rationale, the Court limited the application of the exclusionary rule to scenarios where deterrence was thought to be most effectively served. This shift led the Court to create many exceptions to the exclusionary rule where police officers conducted their search in objective good faith.[84] Deterrence was also initially used as grounds to refuse to apply the exclusionary rule retroactively. But the deterrence rationale would ultimately give way to principle in the context of retroactivity.[85]

78. *Id.* at 348.

79. *Id.*

80. *Id.* at 351–52.

81. *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (refusing to exclude evidence from parole hearings "because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches"); Illinois v. Krull, 480 U.S. 340, 352–53 (1987) (creating a good-faith exception for police reliance on "statute prior to the declaration of its invalidity" since those acting in good faith cannot be deterred).

82. *See* United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984) (using empirical data to note that the exclusionary rule, as any rule of evidence that might bar reliable, probative evidence from the jury, must "pay its way").

83. *See* Herring v. United States, 555 U.S. 135, 141 (2009) ("First, the exclusionary rule is not an individual right and applies only where it result[s] in appreciable deterrence. . . . In addition, the benefits of deterrence must outweigh the costs.") (internal quotation marks and citations omitted)).

84. *See infra* Part II.C.1.

85. *See infra* Part II.C.2.

1. Deterrence Applied: The Court Refuses to Exclude Evidence When Law Enforcement Innocently Violate Fourth Amendment Rights

The deterrence rationale narrowed the scope of the exclusionary rule with the introduction of the good-faith exception. Reasoning that officers who act in good faith cannot be deterred, the Court has said that evidence will not be excluded where police rely in good faith on a warrant later found invalid; where police rely on a statute later overturned; where police rely on a judicial database informing them of an outstanding warrant later found to be false; and where police rely on their own database's list of outstanding warrants that later turns out to be incorrect.

The Court first created the good-faith exception in *United States v. Leon*.[86] In *Leon*, police searched Leon's home pursuant to a magistrate-issued warrant that a court later found invalid.[87] The Court acknowledged that many prior cases had implied that the exclusionary rule was "a necessary corollary of the Fourth Amendment," but rejected this reasoning by suggesting that the Fourth Amendment contains no express provision preventing the use of tainted evidence.[88] Instead, the Court stated that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[89] The Court noted the huge social costs of letting the guilty go free and concluded that the exclusionary rule should only apply where deterrence is best served.[90] If the police believed they were acting legally, then excluding the evidence would not deter their actions in the future.[91] The Court concluded that the exclusionary rule should not apply when police act in objectively reasonable good faith on a magistrate's issuance of a warrant.[92]

Following *Leon*, the Court created other exceptions to the exclusionary rule on the basis of police acting in good faith, each time relying on the deterrence rationale. In *Illinois v. Krull*, the Court refused to exclude evidence where police performed a warrantless administrative search in reliance on a statute that was later found invalid.[93] In

86. 468 U.S. 897 (1984).

87. *Id.* at 903 & n.2.

88. *Id.* at 905–06.

89. *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (internal quotation marks omitted).

90. *Id.* at 907–08.

91. *Id.* at 918–19.

92. *Id.* at 926.

93. 480 U.S. 340, 342–43, 349–53 (1987).

Arizona v. Evans, officers acted in reliance on a court clerk's record of an outstanding arrest warrant later found to be erroneous.[94] The Court refused to suppress evidence found in a search incident to that false arrest, as police had acted in reasonable reliance on the court employees and were therefore undeterrable.[95] Finally, in *Herring v. United States*, the facts were nearly identical to *Evans* with one distinction: the police department made the clerical errors rather than the court system.[96] Nevertheless, the Court concluded that excluding the evidence discovered as a result of the unlawful arrest would not deter police misconduct since the failure to update the police database was negligent and not indicative of some systemic error or reckless disregard for constitutional requirements.[97] The deterrence rationale, as expressed in these good-faith exceptions, has greatly limited the depth of the exclusionary rule and initially limited the breadth of the rule's applicability in the context of retroactivity.

2. *Principle Applied: The Court Abandons the Deterrence Rationale in the Name of Even-Handed Justice and Applies the Exclusionary Rule Retroactively*

Retroactivity deals with how broadly a new rule of criminal procedure will be applied. When on June 19, 1961, the Court in *Mapp v. Ohio* declared that the exclusionary rule applied to the states, the question became whether the rule would apply only prospectively or retroactively as well.[98] If the rule were to apply only prospectively, it would only apply to defendants whose trials were decided after June 19, 1961.[99] If the rule were to apply retroactively, it would apply to defendants whose trials had already concluded but whose convictions were still proceeding through the appellate process and were on direct review or even to defendants who had already been through both trial and appeal, but were attempting to re-litigate their cases by way of collateral review. Initially, the Court crafted a three-pronged test that focused on the deterrent purpose of the exclusionary rule and only applied the exclusionary rule prospectively. The Court later found that this test treated similarly situated defendants differently

94. 514 U.S. 1, 4 (1995).

95. *Id.* at 15–16.

96. 555 U.S. 135, 137–38 (2009).

97. *Id.* at 144–46.

98. Following *Mapp v. Ohio*, there was a split of authority among several courts of appeals concerning its retroactivity. Linkletter v. Walker, 381 U.S. 618, 620 n.2 (1965), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987).

99. *See, e.g.*, *id.* (holding that *Mapp* was to apply only prospectively).

and forced courts to ignore existing law. Ultimately, the Court rejected the deterrence rationale and embraced principled justifications of retroactivity for those still on direct review.

In *Linkletter v. Walker*, the Court relied on the deterrence rationale and held that the exclusionary rule would not be available for defendants whose convictions were final at the time *Mapp v. Ohio* was announced.[100] The Court listed three elements to examine in determining whether a new rule of criminal procedure should be given retroactive effect: the purpose of the new rule, the reliance placed upon the old rule, and the effect of a retroactive application of the new rule on the administration of justice.[101] First, emphasizing that the primary purpose of the exclusionary rule was to deter lawless police conduct,[102] the *Linkletter* Court reasoned that the police misconduct had already occurred and would not be deterred by releasing prisoners.[103] As to the second prong, the Court found that states had relied on and obtained convictions in the absence of an exclusionary rule in state proceedings prior to *Mapp*.[104] Under the third prong of the analysis, the Court found that relitigating cases "would tax the administration of justice to the utmost."[105] Therefore, under *Linkletter*, the exclusionary rule would not be applied retroactively to cases already final.[106]

The Court reevaluated its retroactivity doctrine, returned to principle, and ultimately overturned *Linkletter* and its progeny in *Griffith v. Kentucky*.[107] In *Griffith*, the Court held that a "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[108] The Court first reasoned that, under Article III, its job was to adjudicate cases and controversies, not to promulgate new rules of constitutional criminal procedure.[109] Accordingly, "the integrity of judicial review requires that [the Court] apply [the new] rule to all similar cases

100. *Id.* at 622, 636–37. In a footnote, the Court described convictions that were final as ones "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*." *Id.* at 622 n.5.

101. *Id.* at 636.

102. *Id.*

103. *Id.* at 637.

104. *Id.*

105. *Id.*

106. The Court used similar reasoning in the context of Miranda warnings to hold that even defendants still on direct review would not "benefit fully from . . . new standards governing in-custody interrogation." Johnson v. New Jersey, 384 U.S. 719, 729–32 (1966).

107. 479 U.S. 314 (1987).

108. *Id.* at 322.

109. *Id.*

pending on direct review."[110] Failure to apply the law as it is understood would call into question the entire purpose of the court system.[111]

Second, the Court reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same."[112] Stressing principles of fairness and equality under the law, the Court stated that it does not resolve only one case based on its best understanding of the law and then neglect to apply that understanding to all other cases.[113] Otherwise, courts would essentially be disregarding current law.[114] Therefore, the Court held "that a new rule [of criminal procedure] is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[115]

The good-faith exceptions and the retroactivity doctrine affect the application of the exclusionary rule. In the good-faith exceptions and the retroactivity doctrine, deterrence plays a role. But where the retroactivity jurisprudence first focused on the deterrent purpose of exclusion in deciding whether the rule would apply, the principle eventually triumphed over deterrence. Conversely, the good-faith exceptions are rooted in the Court's shift in focus from principle to a deterrence-only rationale.

III. THE COURT'S REASONING

In *Davis v. United States*, the Supreme Court of the United States affirmed the Court of Appeals for the Eleventh Circuit's holding that a gun found in Davis's jacket was properly admitted into evidence against him.[116] The Court reasoned that, because the purpose of excluding evidence is to deter police conduct, when police act in good-faith reliance on binding appellate precedent, excluding the fruits of that search serves no deterrent purpose, and therefore exclusion would not apply.[117]

110. *Id.* at 323.

111. *See id.* ("If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all." (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (internal quotation marks omitted))).

112. *Id.*

113. *Id.*

114. *Id.* at 326.

115. *Id.* at 328.

116. 131 S. Ct. 2419, 2425–26, 2429 (2011).

117. *Id.* at 2423–24, 2426.

Justice Alito's majority opinion stated that the "sole purpose [behind suppressing evidence] is to deter future Fourth Amendment violations."[118] The Court reasoned that the exclusionary rule "is a prudential doctrine, . . . created by [the] Court to compel respect for the constitutional guaranty" of the Fourth Amendment against unreasonable searches and seizures.[119] "Exclusion is not," the Court reasoned, "a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search."[120] Exclusion is only applicable where it would lead to "appreciable deterrence" of future police violations.[121] The Court does not reflexively apply exclusion to every Fourth Amendment violation, but instead weighs the costs and deterrence benefits of exclusion.[122] As such, the Court continued, a main component of the cost-benefit analysis in determining the efficacy of exclusion is the culpability of the offending officer.[123]

Applying this rationale to Davis's situation, the Court concluded that, although police violated Davis's Fourth Amendment rights, they had acted in reliance on binding precedent, and their actions were therefore not culpable.[124] The Court reasoned that at the time police searched Davis's jacket, their actions were constitutional under *New York v. Belton*.[125] It was not until two years after Davis's search that the Court crafted a new rule in *Arizona v. Gant*, under which the police would have violated Davis's rights.[126] The Court concluded that—as Davis's case was still on direct review—he would receive the retroactive application of the *Gant* rule, and therefore that police did violate his Fourth Amendment rights.[127] But the Court returned to its reasoning that a Fourth Amendment violation does not automatically trigger exclusion; rather, exclusion will only follow if it deters future

118. *Id.* at 2426. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan joined in the majority opinion.

119. *Id.* (internal quotation marks and citations omitted).

120. *Id.* (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)) (internal quotation marks omitted).

121. *Id.* at 2426–27 (internal quotation marks and citations omitted).

122. *Id.* at 2427.

123. *Id.* (citing Herring v. United States, 555 U.S. 135, 143 (2009)).

124. *Id.* at 2428.

125. *Id.* The *Belton* rule stated that officers could search the passenger compartment of an automobile incident to a lawful arrest of an occupant of a vehicle. *Id.* at 2424 (citing *New York v. Belton*, 453 U.S. 454, 460 (1981)).

126. Under *Gant*, an automobile search incident to an occupant's arrest is constitutional (1) if the arrestee if within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. *Id.* at 351.

127. *Davis*, 131 S. Ct. at 2431.

police misconduct.[128] Since the police acted in reliance on binding precedent, the Court concluded that the "absence of police culpability dooms Davis's claim,"[129] and therefore the exclusionary rule would not apply.[130]

Speaking to the dissent, the Court argued that this reasoning was not incompatible with the Court's "retroactivity precedent under *Griffith*."[131] The Court reasoned that the retroactivity jurisprudence is only "concerned with whether . . . a new rule is available on direct review as a *potential* ground for relief."[132] Retroactivity merely "lifts what would otherwise be a categorical bar" to Davis's opportunity for obtaining redress, but retroactivity "does not . . . determine what the 'appropriate remedy' (if any) the defendant should obtain."[133] The Court concluded that "retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether [evidence will be excluded but] it does not answer that question."[134]

The Court further rejected Davis's argument that its decision would "stunt the development of Fourth Amendment law."[135] The Court suggested that this line of thinking misconstrues the role of the exclusionary rule, which exists solely to deter future police misconduct: The rule was not designed to facilitate a defendant's ability to challenge existing precedent.[136]

Writing in dissent, Justice Breyer rejected the Court's application of the good-faith exception to an officer's reliance on binding appellate precedent.[137] He argued that the Court had previously rejected as unworkable the idea of considering an officer's reliance on precedent in favor of a clear approach, under which any new rule for the conduct of criminal prosecutions would apply retroactively to all cases pending on direct review.[138] Justice Breyer suggested that a return to an inquiry of whether an officer was acting in "objectively reasonable . . . reliance on binding appellate precedent" would require a case-by-case analysis that was highly fact-dependent and result in

128. *Id.*
129. *Id.* at 2428.
130. *Id.* at 2434.
131. *Id.* at 2430.
132. *Id.*
133. *Id.* at 2430–31.
134. *Id.* at 2431 (citing United States v. Leon, 468 U.S. 897, 906 (1984)).
135. *Id.* at 2432.
136. *Id.* The Court stressed that it had "repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct." *Id.*
137. *Id.* at 2437 (Breyer, J., dissenting).
138. *Id.* at 2436.

"complex legal argument and police force confusion."[139] He further argued that "the Court's distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent."[140] He suggested that "the source of a new rule is the Constitution itself," and when the Court applies a new rule retroactively, it is not determining "the temporal scope of a newly announced right, but whether a violation of [that] right . . . prior to the announcement of the new rule will entitle a criminal defendant to the relief sought."[141] Here, the Court conceded that the police search, like the search in *Gant*, violated Davis's rights, but unlike Gant, Davis was not entitled to the same remedy of suppression of evidence.[142] This, Justice Breyer concluded, left Davis with a right without a remedy.[143]

Perhaps most importantly, Justice Breyer suggested, the Court's decision threatened to undermine well-settled Fourth Amendment law.[144] He remarked that the Court had created very few exceptions to the exclusionary rule on the basis of police good faith.[145] Justice Breyer reasoned that this is because in many of the cases where defendants sought suppression, police had acted in good faith but still violated the Fourth Amendment rights of the individual.[146] For the Court now to apply the exclusionary rule *only* when police have acted either recklessly, grossly negligently, or in bad faith would affect so many cases that "the 'good faith' exception will swallow the exclusionary rule."[147] Justice Breyer concluded that the Fourth Amendment would no longer protect citizens from unreasonable searches and seizures.[148]

139. *Id.* at 2437 (quoting the majority opinion) (internal quotation marks omitted).

140. *Id.*

141. *Id.* (quoting Danforth v. Minnesota, 552 U.S. 264, 271 (2008)) (internal quotation marks omitted).

142. *Id.* at 2436.

143. *Id.* at 2437.

144. *Id.* at 2438–39.

145. *Id.* at 2439. Justice Breyer listed the various good faith exceptions where the police acted on: a defective warrant, United States v. Leon, 468 U.S. 897 (1984); a mistake in a court database, Arizona v. Evans, 514 U.S. 1 (1995); a mistake in a police database, Herring v. United States, 555 U.S. 135 (2009); and an unconstitutional statute authorizing the search, Illinois v. Krull, 480 U.S. 340 (1987). *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting).

146. *Davis*, 131 S. Ct. at 2439.

147. *Id.*

148. *Id.* at 2440.

IV. ANALYSIS

In *Davis v. United States*, the Supreme Court held that where police violate a defendant's Fourth Amendment rights in conducting a search, but do so in good-faith reliance on binding appellate precedent, the evidence found in that illegal search is admissible at trial.[149] This decision incorrectly expands the deterrence rationale of the exclusionary rule onto the retroactivity doctrine, sweeping principle away and leaving a right with no remedy.[150] It represents another step away from principle to a flawed, deterrence-only rationale in the Court's exclusionary rule jurisprudence.[151] As a result, the Court has created a system that dramatically reduces the adversarial process and threatens to stultify Fourth Amendment litigation as a whole.[152] It encourages an unhealthy gaming of the system for defense attorneys while simultaneously encouraging constitutional violations on the part of law enforcement.[153] As an alternative, the Court should have refused to create a new good-faith exception based on overturned law, and instead applied the retroactivity doctrine as it has been well understood.[154]

A. A Right With No Remedy: Adherence to Deterrence Sweeps Away All Principle

The *Davis* decision marked another step on the steady march away from principle. In refusing to properly apply the *Gant* rule retroactively, the Court ignored its own precedent regarding retroactivity while also refusing to apply the most basic principles of justice. Sadly, this decision was simply the next logical step in an irrational jurisprudence regarding the role of the exclusionary rule.

1. What's in a Name? The Davis *Good-Faith Exception Tramples the Court's Retroactivity Doctrine and Acknowledges a Right with No Remedy*

The *Davis* decision, which in name created a good-faith exception to the exclusionary rule, in practice overturned the Court's jurisprudence on the retroactive application of decisions regarding constitutional rights. The Court attempted to sidestep this criticism by

149. *Id.* at 2423–24 (majority opinion).
150. *See infra* Part IV.A.1.
151. *See infra* Part IV.A.2.
152. *See infra* Part IV.B.1.
153. *See infra* Part IV.B.2.
154. *See infra* Part IV.C.

suggesting that retroactive application of a rule does not imply retroactive application of a remedy. This logic ignores the Court's own statements regarding retroactivity and the underlying reasoning of the retroactivity doctrine. The result is a decision that ignores fundamental principles of justice and leaves a right with no remedy.

When the Court created a good-faith exception for reliance on subsequently overturned precedent, it overturned the current standard for retroactivity and returned to a previously rejected standard. Prior to *Davis*, cases involving good-faith exceptions focused on whether the violation that occurred warranted evidence suppression, while retroactivity focused on whether a particular defendant was entitled to relief.[155] But *Davis*'s new good-faith exception for overturned precedent conflated those two issues and now asks the same question for suppression as it does for retroactivity: whether a defendant will benefit from a new decision holding that conduct once thought to be constitutional is now regarded as unconstitutional.[156] This is why, in reading *Davis*, it is hard to distinguish its reasoning from the previously rejected retroactivity doctrine under *Linkletter* and its progeny.[157] The Court responded to this criticism by suggesting that it was in fact applying the *Gant* rule retroactively, but that retroactive application of a rule does not guarantee application of a remedy.[158]

The problem with this defense is that it ignores the Court's own language to the contrary. In *Davis*, the Court reasoned that "retroactivity . . . is concerned with whether . . . a new rule is available . . . as a *potential* ground for relief," not whether relief would be granted.[159] Prior to *Davis*, however, the Court had stated the exact opposite: the question of retroactivity is not whether a new rule would apply, but

155. Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1103 (2011).

156. *Id.* at 1103–04.

157. *Compare* Davis v. United States, 131 S. Ct. 2419, 2426, 2428 (2011) (resting the Court's holding on the deterrent purpose of the exclusionary rule and the police reliance on precedent), *with* Linkletter v. Walker, 381 U.S. 618, 635–36 (1965) (refusing to apply *Mapp v. Ohio*, 367 U.S. 643 (1961), retroactively onto state decisions because it would not serve the deterrent purpose of the exclusionary rule and because state courts had relied on a pre-*Mapp* lack of exclusion), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987). *See also* United States v. Peltier, 422 U.S. 531, 537 (1975) (noting that retroactivity turned on whether "law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial . . . even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner").

158. *Davis*, 131 S. Ct. at 2430.

159. *Id.*

rather whether the remedy for a violation of that rule was available.[160] Because the Court has not technically announced a new rule at all, the question was not whether a new rule would apply.[161] Rather, what the Court has done is correct what was an earlier, erroneous interpretation of the law.[162] The *Gant* Court did not create a new rule for automobile searches; it corrected an earlier, incorrect understanding of the Constitution in relation to automobile searches.[163] Therefore, Davis's right already existed, and required no retroactive application.

This understanding is consistent with the Court's understanding of its own role. Dating back to its common-law origins, the role of the court has always been to declare what the law is and not to create new laws that require retroactive application.[164] Under this logic, a "newly announced" constitutional rule requires no retroactive application because the rule pre-existed the Court's announcement of that rule.[165] Retroactivity is only concerned with whether a remedy should apply. Therefore, the Court should have excluded the evidence recovered from the unlawful search of Davis's jacket, rather than simply acknowledging that his rights were violated without granting him a remedy.[166] By refusing to grant Davis a new trial where the illegally obtained evidence would be excluded, the Court effectively over-

160. *See* Danforth v. Minnesota, 552 U.S. 264, 271 (2008) ("What we are actually determining when we assess the 'retroactivity' of a new rule is . . . whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.") (cited in *Davis* 131 S. Ct. at 2437 (Breyer, J. dissenting)). The Court cites *Powell v. Nevada*, 511 U.S. 79, 84 (1994), to defend its position that retroactive application does not require relief. *Davis*, 131 S. Ct. at 2431 (majority opinion). But the *Powell* decision, while concerned with retroactive application of a remedy, is distinguishable. In *Powell*, the Court remanded the case to the Nevada Supreme Court without instructions for a remedy because, among other things, there was no remedy yet established for the violation in question—an excessive delay before a probable cause determination hearing. *Powell*, 511 U.S. at 84. Although subject to numerous exceptions, suppression of evidence is still the recognized remedy for Fourth Amendment violations. *See Davis*, 131 S. Ct. at 2426 (acknowledging that the exclusionary rule serves to "compel respect for the constitutional guaranty" of the Fourth Amendment).

161. *Danforth*, 554 U.S. at 271.

162. *Id.*

163. *See supra* text accompanying notes 48–52.

164. *See* Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (stating that Court decisions "declar[e] what the law already is," rather than "creat[e] the law") (emphasis removed); *see also* 1 WILLIAM BLACKSTONE**,** COMMENTARIES *69–71 (explaining that judges do not "make a new law, but [rather] vindicate the old one from misrepresenatation").

165. *Danforth*, 554 U.S. at 271; *cf.* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 59–60 (1966) (discussing the Blackstonian interpretation of discovering the law and how courts, in deciding cases, necessarily apply rules retroactively).

166. United States v. Davis, 131 S. Ct. 2419, 2431 (2011).

turned *Griffith v. Kentucky*, in which it had held that new decisions regarding criminal procedure would apply retroactively to cases on direct review.[167] In doing so, the Court violated the principled justifications for retroactivity: the requirement that courts apply the law as they understand it and treat similarly situated defendants the same.[168]

The deterrence rationale applied in *Davis* sweeps away the principled justification of judicial integrity underlying the current retroactivity doctrine. The Court has its power of judicial review because the people trust that it will resolve all cases on direct review in accordance with its understanding of constitutional principles.[169] With the *Davis* decision, the Court created an exception that allows appellate courts to ignore the current understanding of the law. In this case, the Eleventh Circuit and the Supreme Court refused to properly apply the *Gant* rule to Davis's case, even though the *Gant* rule represented the Court's current understanding of the constitutionality of automobile searches incident to arrest.[170] When the Court reaches a conclusion about a rule of law, but then refuses to apply that rule of law to cases properly before it, the Court's own validity and integrity comes into question.[171]

Even worse, the *Davis* decision explicitly states that similarly situated defendants will be treated differently. Rodney Gant received the benefit of exclusion of evidence,[172] while Willie Davis did not simply because his case reached appellate courts second.[173] Treating

167. *See supra* text accompanying notes 107–115.

168. *See supra* text accompanying notes 112–115.

169. *See* Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgments of two of the three consolidated cases and dissenting in one) ("If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . [T]he Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.").

170. *See Davis*, 131 S. Ct. at 2423–24 (refusing to suppress the gun found in Davis's jacket even though the search was unconstitutional under *Gant*); United States v. Davis, 598 F.3d 1259, 1268 (11th Cir. 2010) (same).

171. *See Mackey*, 401 U.S. at 679 (stating that courts of law must resolve cases on direct review under the best understanding of the law at the time); *see also* JOHN RAWLS, A THEORY OF JUSTICE 235 (1971) (noting that the rule of law is compromised when judges fail to apply the appropriate rule as a part of regular and impartial administration of justice).

172. Arizona v. Gant, 556 U.S. 332, 351 (2009).

173. Although, in this instance, it makes sense that Davis reached appeal second. Rodney Gant was originally arrested on August 25, 1999, *id.* at 335, and his first motion to suppress was denied on June 5, 2000, State v. Gant, No. CR-20000042, 2000 WL 35630010 (Ariz. Super. Ct. June 5, 2000). This was the beginning of eight years of litigation for Gant,

similarly situated defendants differently violates not only the retroactivity doctrine, but also our most basic principles of justice.[174] Even a child can accept an arbitrary parental decision—such as no television after school—provided that decision is applied equally to brother and sister alike.[175] That is why equal treatment under the law is applied outside the context of retroactivity[176] and has been affirmed time and again by the Supreme Court.[177] Equal treatment under the law is necessary to our sense of justice, and requires that like defendants be treated alike.

The end result in *Davis* is a decision that violates the basic principle that every right must have a remedy.[178] Remarkably, the Court freely admits this point.[179] But remedies define rights.[180] And the Supreme Court has recognized the exclusion of evidence as the appropriate remedy for Fourth Amendment violations, without which the right is reduced to a mere "form of words."[181] It seems that some Justices on the Court would be more content with using other remedies

including two separate grants of certiorari by the Supreme Court of the United States. *See* Arizona v. Gant, 552 U.S. 1230 (2008); Arizona v. Gant, 538 U.S. 976 (2003). Davis was originally arrested in April of 2007. *Davis*, 131 S. Ct. at 2425. The point remains true, however, that Gant had his final appeal on direct review decided on April 21, 2009, before the Supreme Court, while Davis did not finish his direct review until June 16, 2011. *See Gant*, 556 U.S. at 332; *Davis*, 131 S. Ct. at 2421.

174. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 226–27 (1977) (discussing the rights under the Equal Protection Clause to equal treatment and to treatment as an equal, whereby every person has the right "to be treated with the same respect and concern as anyone else"); *see also* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 588 (2000) (offering the notion "that justice demands that like cases be treated alike" as a reason for applying precedent to like-situated defendants).

175. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (illustrating the importance of "appearance of equal treatment").

176. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

177. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that prosecutions of defendants are subject to constitutional restraints under the equal protection component of the Due Process Clause and cannot be arbitrarily ignored).

178. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

179. *See* Davis v. United States, 131 S. Ct. 2419, 2430–31 (2011) (acknowledging the application of the *Gant* rule, but only as a potential ground for relief).

180. *See* PAUL SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 26–27 (1983) (rejecting utilitarian arguments regarding the efficiency of rights and arguing that the remedy of rights is essential to the court's legitimacy).

181. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920); *see also* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600 (1983) (arguing that, because courts must "give meaning to constitutional values," exclusion is a necessary remedy of the Fourth Amendment); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) (rejecting other possible remedies for Fourth Amendment violations).

for Fourth Amendment violations.[182] But this suggestion ignores the decision to make the exclusionary rule applicable to the states in part because the states failed to come up with valid, alternative remedies for Fourth Amendment violations.[183] The *Davis* decision has shone a spotlight on what has been an inherently flawed rationale underlying the Court's exclusionary rule jurisprudence.

2. *Principle Denied: The Court's Turn Away from the Principled Justification of the Retroactivity Doctrine Is the Next Step in a Turn Away from Principle in the Exclusionary Rule*

The *Davis* decision, in acknowledging a right with no remedy, was the next logical step in the Court's irrational exclusionary rule jurisprudence. Over the last forty years, the Court has shifted its focus from the rights of the defendant to the culpability of the police. Each time the Court created a good-faith exception to the exclusionary rule, it relied on a faulty premise: Deterrence of police conduct is the sole justification for the exclusion of evidence.[184] The Court has used this logic to say that when police act in good faith, they cannot be deterred and exclusion should not apply.[185] The logic seems sound, except that the premise ignores the Court's original, principled justifications of the exclusionary rule.[186] Additionally, the deterrence-only justification is internally flawed and not based on the empirical study that the Court's cost-benefit analysis demands.[187] Ultimately, this log-

182. *See* Hudson v. Michigan, 547 U.S. 586, 597–98 (2006) (writing for the majority, Justice Scalia suggested that a civil remedy, a Section 1983 lawsuit, was not available at the time of *Mapp*, but may serve as an effective alternative to exclusion). There is constant discussion of alternative remedies for Fourth Amendment violations. *See, e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003) (suggesting sentencing reductions as a remedy for Fourth Amendment violations); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (proposing tort sanctions against officers and departments). But no proposed alternatives are as effective as the exclusionary rule. Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 296–97.

183. Mapp v. Ohio, 367 U.S. 643, 651–53 (1961); *see also* Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 321–22 (detailing the former California Supreme Court justice's conversion to the exclusionary rule as a necessary corollary to the Fourth Amendment); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (suggesting that other remedies for Fourth Amendment violations are not "as a practical matter, maintainable," and that the exclusionary rule is the "primary instrument for enforcing the fourth amendment").

184. *See supra* text accompanying notes 86–97.

185. *See, e.g.*, Herring v. United States, 555 U.S. 135 141–44 (2009) (explaining the rationale of the good-faith exception and enumerating the times where the Court has applied it).

186. *See supra* text accompanying notes 55–59, 64–71.

187. *See supra* note 82 and accompanying text.

ic sets the exclusionary rule on an unstable foundation that has toppled over and destroyed the principled justifications underlying the retroactivity doctrine.

At its inception, the exclusionary rule rested on a principled idea that the government should not benefit from its own law breaking.[188] In particular, the Court was concerned with the idea of judicial integrity and the notion that courts should not approve prior constitutional violations by allowing the fruits of those violations to be used at trial.[189] This theme resonated through decades of Supreme Court jurisprudence,[190] culminating in the incorporation of the exclusionary rule against the states.[191] The Court noted that exclusion was implicit in the Constitution,[192] and necessary to ensure the guarantees of the Fourth Amendment.[193]

When deterrence first emerged as a rationale for exclusion, it was as an additional sword to justify the exclusionary rule as a means of guaranteeing that officers and agencies comply with the Fourth Amendment.[194] But the Court turned the deterrence justification on its head: rather than being used to further justify exclusion, the Court began to question the continued validity of the exclusionary rule in the absence of definitive proof of its deterrent value.[195] Ultimately,

188. *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (emphasizing that unlawful conduct of the government violating constitutional rights "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people . . . have a right to appeal for the maintenance of such fundamental rights").

189. *Id.* at 392, 398.

190. *See supra* note 59.

191. Mapp v. Ohio, 367 U.S. 643 (1961). The Court continued its principled justification in *Mapp*, stating that "no man is to be convicted on unconstitutional evidence." *Id.* at 657.

192. *Id.* at 649; *see also* Ervin, *supra* note 182, at 287 (calling the exclusionary rule a necessary "guaranty against unreasonable searches and seizures"). *But see* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–86 (1994) (arguing that the Fourth Amendment does not require exclusion of evidence, that exclusion was never conceived by the Framers, and that a tort action against law enforcement is the clear and appropriate remedy).

193. *Mapp*, 367 U.S. at 655.

194. *See Elkins v. United States*, 364 U.S. 206, 217 (1960) (noting that "[t]he rule is calculated to prevent, not to repair," and concluding that the way to compel respect for the Fourth Amendment is to remove the incentive to disregard it); *see also* David C. Gray, *A Spectacular Non Sequitur*, 50 AM. CRIM. L. REV. (forthcoming 2013) (manuscript at 43 n.305) (noting that deterrence served to justify exclusion, but did not replace principle as the sole justification).

195. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 416–17 (1971) (Burger, C.J., dissenting) (questioning the effectiveness of the exclusionary rule without clear proof that it serves to actually deter police from violating the Fourth Amendment); *cf.* United States v. Calandra, 414 U.S. 338, 348 (1974) (reason-

the Court turned away from the original, principled justifications and classified them as mere dicta.[196] This has relegated the principled justifications of the exclusionary rule to the dissenting dustbins.[197] Rather than using deterrence to further justify exclusion, the lack of deterrence became a shield to defend the creation of exceptions that would dramatically limit the scope of the exclusionary rule.[198]

Besides ignoring prior precedent, a deterrent-only rationale is internally flawed. Under its current rationale, the Court has treated the exclusion of evidence as a punishment for police misconduct rather than a guarantee of constitutional rights.[199] This punishment approach is built on a fallacy. Simply because exclusion would not deter officers who acted in good faith does not mean that exclusion would not deter future officers from engaging in unlawful behavior.[200] The Court has crafted good-faith exceptions by focusing solely on specific deterrence—deterrence of those officers who acted in good faith—rather than on the general deterrence to be gained by excluding all

ing that the exclusionary rule does not automatically bar the use of illegally seized evidence in all proceedings, but only when the purpose of deterrence is "most efficaciously served").

196. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Expansive dicta in *Mapp* . . . suggested wide scope for the exclusionary rule.").

197. *See, e.g.*, Herring v. United States, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) (suggesting that the exclusionary rule not only deters police misconduct but also allows "the judiciary to avoid the taint of partnership in official lawlessness" (quoting *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting)) (internal quotation marks omitted)).

198. *See id.* at 147–48 (majority opinion) (refusing to exclude evidence where police conduct was negligent at best and was therefore not deterrable); Arizona v. Evans, 514 U.S. 1, 14–15 (1995) (reasoning that police could not be deterred when they relied on a court database informing them of an outstanding warrant and therefore evidence obtained should not be excluded); Illinois v. Krull, 480 U.S. 340, 353 (1987) (holding that evidence should not be excluded where police rely on a statute authorizing warrantless searches and would therefore not be deterred); United States v. Leon, 468 U.S. 897, 916 (1984) (concluding that, because police will not be deterred where they rely on a magistrate's warrant, evidence should not be excluded); *Calandra*, 414 U.S. at 351–52 (concluding that, because police are only concerned with criminal trials, evidence should be admitted at a grand jury proceeding as it would not deter police misconduct); *see also* Gray, *supra* note 194, at 10 (arguing that deterrence has been used as a shield for exceptions to the exclusionary rule, though it is ill-equipped to do so).

199. *See* Davis v. United States, 131 S. Ct. 2419, 2423, 2428 (2011) (referring to the "sanction" of exclusion for police misconduct and concluding that the absence of police culpability "dooms Davis's claim"). On top of continually referring to exclusion as a sanction, the Court's focus on the police's level of culpability in determining whether or not to apply the exclusionary rule suggests that exclusion is a punishment. *See Herring*, 555 U.S. at 137 (stating that the exclusion of evidence turns on the culpability of the police and therefore the potential to deter wrongful conduct); *see also* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1311 (2000) (suggesting that exclusion acts as a sanction to penalize police for their misconduct).

200. Gray, *supra* note 194, at 9–10.

evidence obtained because of constitutional violations.[201] It is true that the individual officers who searched Davis's car acted in accordance with what they reasonably believed was the law and so therefore cannot be deterred.[202] But that does not mean that imposing exclusion could not function as an institutional deterrence, cautioning law enforcement from taking unnecessary risks.[203]

Moreover, the Court's rationale claims to be based on empirical research regarding the costs and benefits of the exclusionary rule,[204] but in fact has little evidence to support any of its claims.[205] Studies comparing the effectiveness of police deterrence against the number of lost convictions are largely inconclusive.[206] But the Court continues to make claims about the huge social costs of the exclusionary rule.[207] These are largely anecdotal and are best summed up by Judge Cardozo's refrain that "[t]he criminal is to go free because the constable has

201. *See* William J. Mertens & Silas Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 369 (1981) (referring to the rationale underlying the good-faith exceptions as "premised on a naive and simplistic understanding of deterrence").

202. *Davis*, 131 S. Ct. at 2438 (Breyer, J., dissenting); *see also* Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 951–52 (1983) (arguing that one of the factors one must take into account to determine the feasibility of deterring police is whether or not police know their action is illegal).

203. Posner, *supra* note 182, at 66. Judge Posner rejected the idea that exclusion could not deter even in the face of those acting in good faith since the exclusion remedy could compel officers to take steps to reduce the probability of committing even innocent violations. *Id.; see also* Gray, *supra* note 194, at 37 (reasoning that exclusion of evidence can act as a general deterrent even where the individual police conduct was non-culpable); Mertens & Wasserstrom, *supra* note 201, at 394–95 (arguing that the exclusionary rule acts as a systemic deterrence because police departments institutionalize judicially articulated standards for the Fourth Amendment).

204. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349 (1974) (reasoning that the decision whether to exclude evidence should be based on weighing the costs and benefits of exclusion).

205. *See* United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (criticizing the deterrence rationale for purporting to be rooted in empiricism but offering "only limited empirical support").

206. *See* Bradley C. Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. TEX. L.J. 558, 572 (1982) ("There is no way to demonstrate that the rule works or that it does not work . . . ."). For an earlier study of the exclusionary rule's effectiveness, with equally mixed results, see generally Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

207. *See Davis*, 131 S. Ct. at 2427 ("The analysis must also account for the 'substantial social costs' generated by the rule." (quoting *Leon*, 468 U.S. at 907)); *see also* Herring v. United States, 555 U.S. 135, 141 (2009) (referring to the "substantial social costs" of excluding evidence) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987) (internal quotation marks omitted)).

blundered."[208] While a clever turn of phrase,[209] the statement does little to provide actual evidence of how often criminals actually "go free" because evidence is suppressed. The argument remains compelling, however, since the exclusionary rule flies in the face of general rules of evidence that would admit otherwise probative and reliable evidence.[210]

Now the deterrence-only rationale has gone from a sword justifying the exclusionary rule, to a shield defending its exceptions, and finally a large club to smash away any other doctrines in its path. It was the next logical step in what has been an irrational jurisprudence that acknowledges a right with no remedy. The Court had previously rejected the *Davis* logic twenty-five years ago in the name of principle.[211] Now the Court returns to its previously rejected rationale, and Willie Davis does not get the same relief that Rodney Gant did. The Court recognizes that Davis's Fourth Amendment rights were violated, but he gets no remedy. Going forward, the *Davis* decision will create many problems not only in principle, but in practice as well.

B. Right With No Remedy Applied: The Government Always Wins

The *Davis* decision creates a number of problems going forward. Given that defendants have little hope for a remedy, the new good-faith exception stultifies Fourth Amendment law. As defendants have little incentive to challenge existing law, the adversarial process is reduced to an exercise in futility. Furthermore, given that evidence would be admitted under the new exception even if the defendant

208. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). Put another way, a large part of the problem people have with the exclusionary rule is that—because it is only invoked by alleged criminals seeking to suppress incriminating evidence—it "rubs our noses in it." John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

209. It is nearly impossible to read an exclusionary rule decision or scholarly work that does not use this quote. *See, e.g.*, *Herring*, 555 U.S. at 148; Hudson v. Michigan, 547 U.S. 586, 614 (2006); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 970 (2010).

210. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965) (noting that the exclusionary rule does not exist to protect against unreliable evidence being admitted); Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCIENCE 246, 251 (1961) (noting the Anglo-American principle that illegal procurement does not necessarily render competent evidence incompetent); Barnett, *supra* note 202, at 941 (explaining that the exclusionary rule may result in suppression of "unquestionably reliable and probative" evidence).

211. Griffith v. Kentucky, 479 U.S. 314, 322–24, 328 (1987) (overruling *Linkletter* and holding that all new rules for criminal procedure will apply retroactively to all cases pending on direct review or not yet final).

wins on the merits of his case, courts can pass on evaluating constitutional issues under a harmless-error analysis.[212] This makes it difficult for defendants to decide how to best litigate their cases: either by attempting to race through the court system or in some instances wait in jail for trial to start.[213] For law enforcement, the *Davis* decision incentivizes excessive constitutional violations with little fear of repercussions.[214]

1. No Matter How Well a Defendant Argues His Case, the Government Will Win

In creating a good-faith exception based on reliance of subsequently overturned law, the Court has threatened to end the evolution of the Fourth Amendment law by reducing the adversarial process to such an extent that defendants may not even have standing to appeal their cases. Additionally, courts can avoid addressing constitutional questions as Fourth Amendment violations can now be treated as a harmless error.

The *Davis* rule greatly diminishes the adversarial process. Our judicial process rests on the idea "that the parties before the court have an actual . . . stake in the outcome," and that this "preserves the vitality of the adversarial process."[215] Defendants like Davis will have no stake in the outcome of evidentiary challenges, since they know they will not benefit from the exclusion of evidence under the newly crafted good-faith exception.[216] Arguments on evidentiary issues under the Fourth Amendment before the Court will be less effective because the parties involved do not have a real interest in the result, and the evolution of the law will be stunted.[217] Defendants might continue to make arguments, but only to make changes in the law for the benefit of future defendants.[218] Courts following *Davis* will in essence

212. *See infra* Part IV.B.1.

213. *See infra* Part IV.B.2.

214. *See infra* Part IV.B.2.

215. Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) (explaining that the adversarial system is crucial to achieving just results).

216. *See* Mertens & Wasserstrom, *supra* note 201, at 371 (suggesting that good-faith exceptions will stultify the Fourth Amendment by removing the incentive for defendants to litigate issues).

217. *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (requiring that parties have a real stake in the outcome of the case so as to sharpen the arguments "upon which the court so largely depends for illumination of difficult constitutional questions").

218. Brief for Petitioner at 34, Davis v. United States, 129 S. Ct. 2419 (2011) (No. 09-11328), 2010 WL 5168874, at *34.

be offering advisory opinions—statements of the law that do not affect the parties before the court—which are expressly forbidden.[219]

If defendants try to bring litigation where they have no hope for a remedy, it is possible they will not even have standing to challenge adverse evidentiary rulings. Article III standing requires "that a favorable judicial decision will prevent or redress the injury."[220] Under the Court's *Davis* rationale, if a defendant challenges an existing Supreme Court or circuit court Fourth Amendment precedent, the outcome will always be the same: the government always wins.[221] Either the Court agrees with the government on the Fourth Amendment issue and therefore rules for the government on the merits, or the Court agrees with the defendant on the Fourth Amendment issue but the evidence gets admitted anyway under the expanded good-faith exception.[222] The good-faith exception removes the Court's ability "to redress the defendant's injury, eliminating Article III standing" for defendants challenging established Fourth Amendment law.[223] If the Court is not adjudicating cases on the merits, it is unclear why the Court should hear them at all.[224]

Fourth Amendment law will further stultify as courts can avoid reviewing constitutional issues under a harmless-error analysis. When defendants raise issues on appeal, appellate courts can ignore any error "that does not affect substantial rights."[225] The Court has said that an error does not affect substantial rights if it did not affect how the jury reached its verdict,[226] and has even said that this can apply to violations of constitutional rights.[227] Defendants attempting to exclude

219. Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)) (internal quotation marks omitted)).

220. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

221. *See* Kerr, *supra* note 155, at 1082 (arguing that creating a good-faith exception for overturned law would skew all Fourth Amendment litigation in the government's favor).

222. Brief for Petitioner, *supra* note 218, at 26.

223. *Id.*

224. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgments of two of the three consolidated cases and dissenting in one).

225. FED. R. CRIM. P. 52(a).

226. *See* Kotteakos v. United States, 328 U.S. 750, 764 (1946) (explaining that the significance of an error is determined by the "effect the error had or reasonably may be taken to have had upon the jury's decision").

227. *See* Chapman v. California, 386 U.S. 18, 22 (1967) ("[T]here may be some constitutional errors which . . . are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction."); *see also* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 317–18 (2002) (discussing the implications of

evidence as the result of a Fourth Amendment violation will not have their challenges reviewed since, under *Davis*, the constitutional violation is harmless: either the defendant loses his challenge on the merits, therefore no constitutional violation and evidence is admitted; or the defendant wins his challenge but law enforcement acted in good faith, so evidence gets admitted anyway.

The Court responded to these criticisms by suggesting that open questions of Fourth Amendment law in certain jurisdictions would still provide an avenue for constitutional litigation,[228] but this argument cannot withstand scrutiny. Even for open questions, it is difficult to see how law enforcement could not qualify for the new good-faith test of reliance on overturned precedent. For example, consider *United States v. Jones*,[229] where the issue was whether the police use of a GPS tracking device on the defendant's car without a warrant violated his Fourth Amendment rights.[230] Neither the Founding Fathers nor the Supreme Court has ever before considered the validity of such a practice under the Constitution, which makes it ostensibly an open issue of Fourth Amendment law. All defendants similarly situated to Jones, whose Fourth Amendment rights had been violated prior to the *Jones* decision but whose cases are still on direct review, are without a remedy after *Davis*.

Indeed, under *Davis*, in the context of *Jones*, law enforcement could plausibly argue that, given that they had no direction on whether or not their actions were in violation of the Fourth Amendment, their actions were reasonable and therefore exclusion would

the *Chapman* decision). Compounding this problem is that in a different context the Supreme Court has more recently held that appellate courts do not have to decide the merits of a constitutional challenge before deciding whether that constitutional violation was harmless. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (rejecting the two-prong analysis for qualified immunity questions under *Saucier v. Katz*, 533 U.S. 194 (2001)). Under *Saucier*, courts were required to answer first whether there was a violation of a constitutional right, and only after that could they determine whether that right was properly established. *Saucier*, 533 U.S. at 201. The *Pearson* Court maintained that this approach was preferred, but explained that it is no longer mandated. *Pearson*, 555 U.S. at 236.

228. Davis v. United States, 131 S. Ct. 2419, 2433 (2011).

229. 132 S. Ct. 945 (2012). This case arose from a D.C. Circuit Court of Appeals case where two appellants, Antoine Jones and Lawrence Maynard, appealed their convictions after a joint trial for conspiracy to distribute. *See* United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), *cert. granted*, 131 S. Ct. 3064.

230. *Jones*, 132 S. Ct. at 948. Specifically, the two questions raised at the appellate level were whether the placement of the GPS on the car constituted a search at all, and, if so, whether the defendant had a reasonable expectation of privacy that would prevent the police from tracking his movement in the car twenty-four hours a day, seven days a week. *Maynard*, 615 F.3d at 555.

achieve no deterrence and should not apply.[231] At worst, law enforcement's actions in relation to open questions would be Fourth Amendment-neutral.[232] The Court could reasonably conclude that deterrence is not advanced where police did not know their actions were unlawful, and thus refuse to suppress evidence.[233]

Additionally, the government may try to turn a seemingly open question into one already resolved by precedent. In *Jones*, the government argued that it relied on binding appellate precedent when it used the GPS devices.[234] The argument was not implausible and, had the facts not included other Fourth Amendment violations resolving the case, could have triggered the problems noted above.[235] Going forward, in cases like *Jones*, things will play out one of two ways: either the Court finds in favor of the government on the merits of the case and the petitioner loses; or it accepts petitioner's argument, but still finds that the police were acting in reasonable reliance on binding appellate precedent.[236] In each scenario, the petitioner will not bene-

231. *See* United States v. Leon, 468 U.S. 897, 919 (1984) (noting that exclusion "should not be applied . . . to deter objectively reasonable law enforcement activity").

232. Ultimately, the *Jones* Court spent no time addressing whether or not a remedy should apply for Jones. There, however, Fourth Amendment violations included more than simply the open question of whether the use of a GPS device implicated the Fourth Amendment. The officers in *Jones* had received a ten-day warrant for the use of the device in Washington, D.C., but installed the device on Jones's car on the eleventh day and in Maryland. *Jones*, 132 S. Ct. at 948.

233. At least one court has noted with approval this argument post-*Jones*. *See* United States v. Luna-Santillanes, No. 11-20492, 2012 WL 1019601, at *7 n.5 (E.D. Mich. Mar. 26, 2012) (acknowledging the persuasiveness of the government's argument that the police use of a GPS was reasonable, given that it was not held unconstitutional by the Sixth Circuit Court of Appeals, and so exclusion would do nothing to deter police misconduct).

234. *See* Brief for the United States at 12, United States v. Jones, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881, at *12 (arguing that police relied on the Supreme Court's decision in *United States v. Knotts*, 460 U.S. 276, 283–85 (1983), which allowed the use of electronic devices to enhance what a person "knowingly expose[s] to the public"). The government also argued that, under *Katz v. United States*, 389 U.S. 347, 351 (1967), the Fourth Amendment does not apply to what someone "knowingly expose[s] to the public," and so the tracking of the defendant's movements in public cannot constitute a search. *Id.* (quoting *Katz*, 389 U.S. at 351).

235. Three circuits had already either approved in a holding or noted with approval the use of GPS devices. *See, e.g.*, United States v. Pineda-Moreno, 591 F.3d 1212, 1216 (9th Cir. 2010) (rejecting Pineda-Moreno's claim that attaching a mobile tracking device to his car violated his Fourth Amendment rights); United States v. Marquez, 605 F.3d 604, 609–10 (8th Cir. 2010) (ruling that Marquez did not have standing to challenge the use of GPS devices but also suggesting that the use of a GPS device is not a search as Marquez had no reasonable expectation of privacy over the location of his car); United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007) (approving of the use of a GPS device on the car of an individual already under suspicion).

236. *See supra* note 221 and accompanying text.

fit from the exclusion of evidence and the government wins.[237] So even "open" questions of Fourth Amendment law demean the adversarial process by giving litigants no real stake in the outcome of their Fourth Amendment arguments, and allow courts to pass on difficult questions under a harmless error review.[238]

In response to this criticism, the Court said simply that overturning precedent is not a purpose of the exclusionary rule.[239] Again, the Court used the exclusionary rule as a hammer to bludgeon any valid challenges to its increasing number of exceptions. It is true that overturning case law is not a purpose of the exclusionary rule. But arriving at the proper meaning of the Constitution is a purpose of the adversarial process and of judicial review, and the *Davis* decision jeopardizes that process in the context of Fourth Amendment evidentiary decisions. The *Davis* decision threatens not only the validity of the judicial process, but negatively affects how lawyers and police act as well.

2. *Defendants Are Left with Unusual Tactics in the Hope of Getting a Remedy, While Police Are Encouraged to Violate the Constitution (the Government Wins)*

Given that similar defendants will be treated differently and there may be no hope for a remedy through the exclusionary rule, defendants are left with a choice of how best to manipulate the adjudication of their cases in order to get the best results. For defense attorneys, the *Davis* decision creates a "race to the courthouse" scenario: each appellant will try to be the first one to reach appellate review in the hope of receiving a remedy for the violation of his con-

237. This has already begun. The United States District Court for the Northern District of Iowa recently admitted evidence gained from the warrantless use of a GPS device based on the *Davis* good-faith exception that police had relied on binding appellate precedent. United States v. Amaya, No. CR 11-4065-MWB, 2012 WL 1188456 (N.D. Iowa Apr. 10, 2012). The *Amaya* court used the *Davis* rationale in a particularly troublesome way. The court reasoned that police relied on binding appellate precedent where the Eighth Circuit had not definitively held that the use of a GPS device was legal. *Amaya*, 2012 WL 118456, at *5 (citing *Marquez*, 605 F.3d at 610). *Marquez* had rejected a defendant's Fourth Amendment challenge to the use of GPS on standing grounds, but had noted in the alternative that the use would have been acceptable. *Marquez*, 605 F.3d at 609–10. The *Amaya* court reasoned that this was not dicta, but rather an alternative holding, and concluded that police reasonably relied on this alternative holding. *Amaya*, 2012 WL 118456, at *5. This case reinforces Justice Breyer's concern about the confusing nature of what makes for legal precedent, Davis v. United States, 131 S. Ct. 2419, 2437 (2011) (Breyer, J., dissenting), and also shows how easy it can be for courts to interpret these types of Fourth Amendment challenges in the government's favor.

238. *See supra* note 223 and accompanying text.

239. United States v. Davis, 131 S. Ct. 2419, 2432 (2011).

stitutional rights.[240] Conversely, some attorneys might try to delay the beginning of a client's trial, knowing that a pending Supreme Court case could affect the outcome of the case, but that the client would not benefit from any newly announced rule if her case has already begun and so sits in the *Davis* "direct review" purgatory.[241] This will actually provide defendants with an incentive to remain in jail longer while awaiting trial.

The government, by contrast, will be emboldened to continue to push the limits of constitutionally acceptable behavior. Police can treat any ambiguous practice as having been already decided in their favor, comfortable with the knowledge that the Court will later grant a good-faith exception for their practices. For example, by the time *Arizona v. Gant* was decided, police in many jurisdictions had been applying *Belton* as a per se right to search automobiles rather than a fact-dependent situation involving officer safety and the prevention of destruction of evidence.[242] If it turned out law enforcement violated the Fourth Amendment, as it was in those jurisdictions that applied *Belton* as a per se right to search, evidence would still be admitted under the *Davis* good-faith exception.

Even for procedures not yet addressed by the Supreme Court, police may feel completely comfortable continuing practices that the Court may later decide are violations of the Fourth Amendment. Consider once again *United States v. Jones*, the GPS-tracking case.[243] The government argued that police relied on precedent in determining that attaching GPS devices to automobiles and tracking suspects over long periods was a constitutionally valid exercise.[244] Prior to *Davis,* from the moment the Supreme Court granted certiorari to hear Jones's case, police would have had two choices: (1) continue the GPS tracking in the hope that the Supreme Court decides in their favor; (2) stop the procedure out of fear that the Supreme Court would decide the practice is invalid and invalidate evidence derived from the

240. It is actually unclear from the *Davis* decision, however, whether the first litigant to reach appellate review will even receive the benefit of a remedy. Adhering strictly to the Court's own logic, when police act in good-faith reliance on precedent, even the first successful litigant may not have his evidence suppressed. So it is possible that even Rodney Gant would not have benefitted from the *Gant* rule if his case had been litigated after the *Davis* decision.

241. *Cf.* United States v. Davis, No. 2:07-cr-0248-WKW, 2008 WL 1927377, at *3 (M.D. Ala. Apr. 28, 2008) (noting the preservation of the search issue in the hope that the Court would change the Fourth Amendment landscape with its *Gant* decision).

242. Thornton v. United States, 541 U.S. 615, 627–28 (2004) (Scalia, J., concurring in the judgment).

243. 132 S. Ct. 945 (2012).

244. Brief for the United States, *supra* note 234, at 12.

illegal practice. After *Davis*, law enforcement now has a third option: ramp up what could be a constitutionally-invalid procedure, knowing that the Court will still admit the evidence under the new good-faith exception. Law enforcement officers know they can continue to benefit from a potentially invalid procedure and will not suffer any of the consequences for their actions since the actions were done in good-faith reliance on binding precedent. For truly open questions, the government could argue that law enforcement could not be deterred from doing what it did not know was unlawful. So why not benefit from the suspect practice as much as possible before it goes away?[245] *Davis* has created a system that incentivizes constitutional brinksmanship by law enforcement.

C. Return to Principle and Fourth Amendment Rights

As an alternative, the Court could have chosen to do nothing. In other words, rather than create a new good-faith exception, the Court should have applied its retroactivity jurisprudence appropriately and given Davis the same remedy as Gant. Even accepting the Court's jurisprudence regarding the costs and benefits of exclusion, the costs in this case would be few, while the benefits would at least be maintaining the principled justifications of the retroactivity doctrine. Better still, the Court could have recognized the problems of the deterrence-only rationale and re-injected principle into its exclusionary rule jurisprudence. Doing so would place the exclusionary rule and the Fourth Amendment on stable ground.

The Supreme Court could have simply followed its earlier holding that new rules of criminal procedure will apply retroactively to all cases on direct review or otherwise not final.[246] Such a decision would have maintained the principled justifications that the Court supplied in *Griffith* when it abandoned the reasoning it now returns to in *Davis*.[247] Davis would have received a remedy for the violation of his rights. Davis would have been treated the same way as Rodney Gant, a similarly situated defendant. Granting defendants remedies will en-

245. As an example, following the *Jones* decision, the FBI took down about 3,000 GPS trackers that were in use. Julia Angwin, *FBI Turns Off Thousands of Devices After Supreme Court Ruling*, WALL ST. J. BLOG (April 29, 2012, 8:16 PM), http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/.

246. Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

247. *See id.* at 322–27 (outlining the reasons for rejecting *Linkletter*).

sure the healthy evolution of Fourth Amendment law by maintaining a vital adversarial process.[248]

Even accepting the Court's cost-benefit analysis, applying the retroactivity law as it stood before *Davis* would cost very little. As the costs of exclusion are severely limited already,[249] excluding tainted evidence in cases like *Davis* would not greatly increase the social cost of exclusion.[250] It is also exceedingly difficult to put an accurate number on just how many convictions are actually lost as a result of the suppression of evidence.[251] Conversely, some of the benefits are equally hard to quantify because they deal with the theoretical benefit of rights.[252] Even so, those rights are so basic to our system of justice that they must be protected.[253] Ideally, the Court would not only apply the principled justifications of the retroactivity doctrine, but take this opportunity to reinvigorate the exclusionary rule with its principled justifications as well.[254] The Court in this case need not take even that modest of a step; it could have simply drawn a line on deterrence at the walls of the principled retroactivity doctrine and properly applied its own precedent.

248. *See supra* Part IV.B.1; *see also* Kerr, *supra* note 155, at 1082 (suggesting that proper application of the exclusionary rule serves as a deterrent on the court system from reaching bad results, thereby enabling the evolution of good law).

249. *See, e.g.*, Herring v. United States, 555 U.S. 135, 147–48 (2009) (creating a good-faith exception for reliance on a negligently updated warrant list); United States v. Leon, 468 U.S. 897, 926 (1984) (creating a good-faith exception for reliance on a magistrate's warrant).

250. Moreover, from the facts of this case, it is possible that the evidence could have been admitted under the inventory exception to the exclusionary rule. *See* South Dakota v. Opperman, 428 U.S. 364, 375–76 (1976) (granting police the right to do an inventory search of an arrestee's automobile after impounding the vehicle). This issue was not challenged on appeal, and so was not briefed before the Supreme Court.

251. *See supra* note 206 and accompanying text (listing various empirical studies of the costs of the exclusionary rule that ultimately came back inconclusive).

252. *See* Schuck, *supra* note 180, at 26 ("Rights preoccupy a Don Quixote; remedies are the work of Sancho Panza.").

253. *See* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (arguing that Fourth Amendment rights "are not mere second-class rights but belong in the catalog of indispensible freedoms"). Justice Jackson had returned as a prosecutor from the Nuremburg trials and recognized that one sure path to totalitarianism is to allow the government to trespass into your home and effects without justification. Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1227–29 & nn.118 & 120 (1998).

254. *See* Gray, *supra* note 194, at 3. Professor Gray draws an analogy between justifications for the exclusionary rule and common-law justifications for criminal punishment and finds that deterrence alone cannot support exceptions to the exclusionary rule in the same way that a deterrence rationale for criminal punishment cannot justify culpability-based excuses from criminal punishment. *Id.* at 4–5, 9–10. He calls for a return to principle in the context of the exclusionary rule. *Id.* at 3.

V. CONCLUSION

The *Davis* decision incorrectly expanded the rationale of the exclusionary rule onto the retroactivity doctrine. As a result, the principles of treating similar defendants the same and providing a remedy for rights have been swept away.[255] This decision diminishes the adversarial process by creating a system where the government always wins and will in effect end the evolution of Fourth Amendment law.[256] In practice, *Davis* makes it impossible for defendants to decide how best to litigate their cases while encouraging law enforcement to press the edges of what is constitutionally acceptable.[257] The Court should have simply applied the retroactivity doctrine the way its own precedent demands.[258] This would have signaled that, in at least some areas, principle still wins out over empirical pragmatism.

255. *See supra* Part IV.A.
256. *See supra* Part IV.B.1.
257. *See supra* Part IV.B.2.
258. *See supra* Part IV.C.